

# KISSINGER & FELLMAN, P.C.

ATTORNEYS AT LAW  
PTARMIGAN PLACE, SUITE 900  
3773 CHERRY CREEK NORTH DRIVE  
DENVER, COLORADO 80209  
TELEPHONE: (303) 320-6100  
TOLL FREE : 1-877-342-3677  
FAX: (303) 327-8601  
www.kandf.com

RICHARD P. KISSINGER  
KENNETH S. FELLMAN  
JONATHAN M. ABRAMSON  
BOBBY G. RILEY  
NANCY CORNISH RODGERS

ROBERT E. JAROS  
1941 - 2002

November 10, 2008

## VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

*Re: CTIA Petition for Declaratory Ruling / WT Docket No. 08-165*  
*Ex Parte Communication*  
*Notice of Meeting with Commissioner Copp's Office*

Dear Ms. Dortch:

My name is Ken Fellman and I am an attorney representing the Greater Metro Telecommunications Consortium ("GMTC"), the Summit County Telecommunications Consortium ("SCTC"), the Rainier Communications Commission ("RCC"), and the City of Boulder, Colorado. My clients have filed Comments and Reply Comments in the CTIA Petition affecting siting of wireless telecommunications facilities, WT Docket No. 08-165.

On November 7, 2008, myself, along with Darryn Zuehlke (Director of the Denver Office of Telecommunications and President of GMTC), and Ron Lucas (Mayor of Steilacoom, Washington and Chair of RCC), met with Bruce Gottlieb, Legal Advisor to Commissioner Cops, to discuss the referenced matter. We spoke about the issues raised in our Comments and Reply Comments as outlined in the attached Presentation Paper. Additional documents provided at the meeting include:

1. Comments of the Greater Metro Telecommunications Consortium, the Rainier Communications Commission, the Summit County Telecommunications Consortium, and the City of Boulder, Colorado.
2. Reply Comments of the Greater Metro Telecommunications Consortium, the Rainier Communications Commission, the Summit County Telecommunications Consortium, and the City of Boulder, Colorado.
3. A printout from the FCC website regarding Section 332 violations.  
(<http://wireless.fcc.gov/siting/local-state-gov.html>).
4. A printout from the FCC website regarding the LSGAC and CTIA Agreement creating guidelines for facility siting implementation ([www.fcc.gov/statelocal/agreement.html](http://www.fcc.gov/statelocal/agreement.html)).

November 10, 2008

Page 2


5. A copy of the CTIA Press Release dated August 5, 1998 announcing the Agreement on antenna siting disputes ([www.ctia.org/media/press/body.cfm/prid/281](http://www.ctia.org/media/press/body.cfm/prid/281)).

6. Reply Comments of the City of Texas City, Texas in this Docket proceeding.

Pursuant to Rule 1.1206 of the Commission's Rules, an electronic copy of this letter and the attached Presentation Paper are being filed via the Electronic Comment Filing System (ECFS) in this matter.

Please feel free to contact me with any additional questions or concerns you may have.

Very truly yours,  
KISSINGER & FELLMAN, P.C.

  
Kenneth S. Fellman  
[kfellman@kandf.com](mailto:kfellman@kandf.com)

KSF/eaj

Enclosure

cc: Bruce Gottlieb, Legal Advisor (via email [bruce.gottlieb@fcc.gov](mailto:bruce.gottlieb@fcc.gov))

GREATER METRO (DENVER) TELECOMMUNICATIONS CONSORTIUM, RAINIER  
COMMUNICATIONS COMMISSION (PIERCE COUNTY, WA), SUMMIT COUNTY (CO)  
TELECOMMUNICATIONS CONSORTIUM AND THE CITY OF BOULDER, COLORADO

Presentation to Bruce Gottlieb, Wireless and International Legal Advisor  
Office of Commissioner Michael J. Copps  
WT Docket No. 08-165, November 6, 2007

**I. The Statute is not ambiguous, and Congress did not provide the legal authority to impose a shot clock on local government action.**

- A. 47 U.S.C. § 332(c)(7) preserves local government authority over wireless facility placement, and excludes applicability of statutory sections, including § 253.

A local government must act “within a reasonable period of time... taking into account the nature and scope of such request.”  
§ 332(c)(7)(B)(ii)

- B. “If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. *It is not the intent of this provision* to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.” H.R. Conf. Rep. No. 104-458, at 208 (1996).

This indicates (1) Congress specifically anticipated the use of variances, public hearings and other comment processes, and (2) a fact-specific, case-by-case analysis, based upon the time zoning authorities take to act on similar, non-wireless land use applications – not a nationwide shot clock.

- C. Courts have interpreted the statute consistent with the Congressional intent.

“There is nothing to suggest that Congress, by requiring action ‘within a reasonable period of time,’ intended to force local government procedures onto a rigid timetable where the circumstances call for study, deliberation, and decision-making among competing applicants.” *Sprint Spectrum, L.P. v. City of Medina*, 924 F.Supp. 1036 (W.D.Wash. 1996).

“[B]y requiring action within a reasonable period of time, Congress did not intend to create arbitrary time tables that force local authorities to make hasty and ill-considered decisions.” *SNET Cellular, Inc. v. Angell*, 99 F.Supp.2d 190, 199 (D.R.I. 2000).

- D. Congress intended Section 332(c)(7)(B) to be the exclusive provision governing siting of wireless facilities. Pursuant to Section 332(c)(7)(A) “Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” Sections 332 and 253 are part of Chapter 5 of Title 47, hence, Congressional intent is clear that Section 253 does not apply.

- E. The Commission's own website indicates that violations of Section 332 are handled exclusive by the courts, except for matters dealing with the health effects of radio frequency emissions. <http://wireless.fcc.gov/siting/local-state-gov.html>.
- F. Proponents of the petition argue that the rule sought is analogous to the Commission's 621 Order, and that if the zoning authority does not feel it has enough time to act, it can avoid the "deemed granted" remedy by denying the application. However, Section 621 is different than Section 332, and an applicant's failure to provide sufficient information upon which a zoning authority can base as decision within a federally imposed shot clock will not support local action denying the siting request. Applications can only be denied on the basis of *substantial evidence contained in a written record*. Section 332(c)(7)(B)(iii).

## **II. The Commission must require that notice be given to local governments alleged to be "bad actors."**

- A. Note 1 to Commission Rule 1.1206(a). When seeking Commission preemption of state or local regulatory authority, "the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption."
  - 1. Section VI of the Petition clearly and directly requests preemption of state and local law. The Petition cites unnamed localities in New Hampshire and Vermont, whose ordinances must be preempted, and cites examples of variance procedures under existing local law in Marquette and Waupaca Counties, Wisconsin that should be preempted as they apply to wireless providers.
  - 2. "Interpreting" the alleged ambiguity, as CTIA requests, will absolutely result in preemption because it will render local laws invalid, and impose federally imposed land use rules upon local governments in their place.

## **III. The anecdotal examples and referenced (but not provided) CTIA membership survey do not amount to verifiable record evidence of a widespread national problem, justifying federal preemption of local land use authority.**

- A. There are 38,967 units of local governments (counties, municipalities, towns and townships) in the United States. U.S. Census Bureau, [www.census.gov/govs/www/02PubUsedoc\\_GovOrg.html#GP\\_Govs](http://www.census.gov/govs/www/02PubUsedoc_GovOrg.html#GP_Govs).
- B. CTIA claims there are about 760 applications that have been pending for over a year. If these applications were all "delayed" due to the fault of a local government and if there were 760 separate local governments causing the delays, it means that just under two percent (0.0195) of all local governments are, according to CTIA, acting improperly.
- C. Two examples demonstrate why notice must be required and why anecdotal evidence cannot be relied upon. T-Mobile cited allegations of local governments it claimed were unreasonable, including Pierce County, Washington and Texas City, Texas. Pierce County was participating in the proceeding through the Rainier Communication Commission, and was able to demonstrate the inaccurate T-Mobile representations in its Reply Comments. Texas City learned of the allegations against it through a local government list serve, and its Mayor filed

Reply Comments demonstrating that T-Mobile's accusations were incorrect. The Commission cannot rely on anecdotal evidence, unless all parties are notified and given an opportunity to respond.

- D. Even if the Commission had jurisdiction, it lacks the evidentiary record to support a one size fits all federal rule preempting land use authority in each of these governmental entities.

**IV. CTIA should be encouraged to work cooperatively with local governments, as it has in the past, to address siting issues of concern.**

- A. In 1996, CTIA filed a petition seeking preemption of local land use authority with respect to zoning moratoria. DA 96-240.
- B. With Commission support, the Commission's Local and State Government Advisory Committee worked with CTIA to define issues of concern and develop a voluntary solution. Those negotiations resulted in an agreement whereby the petition to preempt local land use authority was withdrawn. [www.fcc.gov/statelocal/agreement.html](http://www.fcc.gov/statelocal/agreement.html). CTIA's press release noting the benefits of these cooperative efforts still appears on the organization's web site. [www.ctia.org/media/press/body.cfm/prid/281](http://www.ctia.org/media/press/body.cfm/prid/281).

**V. Conclusion.**

- A. There is no justification – either legal authority in the statute or evidence in the record – for the relief sought by CTIA.
- B. If granted, the relief requested will wreak havoc with local zoning of wireless facilities. It will make it difficult, if not impossible to comply with local and state notice and hearing requirements; with state environmental and historic preservation requirements; and with federal aviation safety requirements.